

Federal Communications Commission

DA 95-107

FCC MAIL SECTION

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 Federal Communications Commission
 Washington, D.C. 20554

MM Docket No. 95-14

In the Matter of

Amendment of Section 73.202(b) RM-8552
 Table of Allotments,
 FM Broadcast Stations.
 (Leavenworth, Othello and
 East Wenatchee, Washington)

**NOTICE OF PROPOSED RULE MAKING
 AND ORDER TO SHOW CAUSE**

Adopted: January 24, 1995; Released: January 30, 1995

Comment Date: March 24, 1995

Reply Comment Date: April 10, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ronald A. Murray, d/b/a Murray Broadcasting ("petitioner"), permittee of Channel 249A, Leavenworth, Washington, proposing the substitution of Channel 266A for Channel 249A at Leavenworth and the modification of Station KLVH(FM)'s construction permit accordingly.¹ To accommodate the substitution, petitioner also proposes the downgrade of Channel 248C1 to Channel 248C3 at Othello, Washington, and the substitution of Channel 249A for Channel 266A at East Wenatchee, Washington.² Petitioner states his intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner states that pursuant to *Report and Order* (MM Docket No. 92-242, 8 FCC Rcd 850 (1993)), Station KLVH(FM) was issued a construction permit (File No. BPH-930423MF) for Channel 249A at Leavenworth, Washington. Petitioner also states that pursuant to *Report and Order* (MM Docket 91-114; 6 FCC Rcd 6476(1991)), Station KYSN(FM)'s license was modified to specify Channel 266A at East Wenatchee, Washington. Petitioner submits that Station KLVH(FM)'s construction permit for Channel 249A at Leavenworth was granted on the assumption that Station KZLN-FM would be upgraded from Channel 248C3 to Channel 248C1 at Othello, Washington, and that Station KYSN(FM)'s license would be

modified from Channel 249A to Channel 266A in East Wenatchee to accommodate the upgrade. However, petitioner claims that the upgrade was never effectuated and that Station KYSN(FM) has not received reimbursement for costs in changing frequency. In fact, petitioner asserts that although Station KZLN-FM's permittee, P-N-P Broadcasting, Inc. ("P-N-P"), requested and was granted authority to operate on Channel 248C1, effective December 23, 1991, it did not file an FCC Form 301 for a construction permit for the channel.³ As a result, on June 10, 1993, the Commission sent P-N-P a letter advising that unless it filed an FCC Form 301 application for a construction permit for Class C1 facilities within 30 days, it could result in P-N-P being made a party to an allocation rule making seeking to downgrade the allotment. P-N-P was also notified that the application would take precedent if filed before any conflicting rule making was initiated. If filed after a rule making petition, P-N-P was informed that the application would be subject to the outcome of the rule making proceeding. P-N-P did not file a Form 301 to upgrade Station KZLN-FM to Class C1 facilities. Therefore, petitioner deems that P-N-P has abandoned its interest in the Class C1 allotment at Othello. Furthermore, petitioner claims that although Station KYSN(FM)'s license was modified to specify operation on Channel 266A at East Wenatchee, the station is still operating on Channel 249A, thereby precluding petitioner from conducting program tests on Channel 249A at Leavenworth. Petitioner alleges that Station KYSN(FM)'s has not moved to the new channel because of P-N-P's failure to reimburse the station for changing frequency. Therefore, in order to resolve the conflict, petitioner urges the Commission to adopt its proposal.

3. Generally, whenever an existing licensee or permittee is ordered to change frequencies to accommodate a new channel allotment, Commission policy requires the benefiting party, or parties, to reimburse the affected station for costs incurred. See *Circleville, Ohio*, 8 FCC 2d 159 (1967). Here, petitioner asserts that Station KYSN(FM) has not changed to Channel 266A and is still operating on Channel 249A. Therefore, petitioner states that it is not required to reimburse Station KYSN(FM) for any costs incurred in changing frequency. However, if Station KYSN(FM) can establish costs that directly concern the frequency change, then it could claim reimbursement and petitioner must state its willingness to do so. See *Burkesville and Russell Springs, Kentucky, Cookeville and Spencer, Tennessee*, 5 FCC Rcd 677 (1990). Petitioner requests that the FM Table of Allotments be amended to accurately reflect Channel 249A in lieu of Channel 266A at East Wenatchee.

4. We believe the public interest would be served by proposing the substitution of Channel 266A for Channel 249A at Leavenworth, Washington, and the modification of Station KLVH(FM)'s construction permit accordingly, in order to eliminate the conflict with Station KYSN(FM) at East Wenatchee, and to enable Station KLVH(FM) to commence operation. The Class A station would provide the

¹ On September 7, 1994, Station KLVH(FM) was granted special temporary authority ("STA") (File No. 940822WW) to operate on Channel 266A on program test authority until resolution of the instant rule making proceeding. The STA expires on March 7, 1995.

² An application for the assignment of the license for Station KYSN(FM) at East Wenatchee, from Sunbrook Wenatchee, L.P. to Sunbrook Communications has been accepted for filing (File No. BALH-941116GT).

³ We note that by letter dated March 26, 1992, Station KZLN-FM informed the Commission that it was in the process of gathering information and preparing an application to implement the class C1 upgrade. However, Station KZLN-FM was cautioned that although the letter indicates a continuing interest in upgrading, such letters are informational only and do not exempt Station KZLN-FM from the possible consequences of continued delay in filing its Form 301 application.

community with its first local aural transmission service. In order to accommodate the substitution, we also propose the downgrade of Channel 248C1 to Channel 248C3 at Othello, Washington, and the modification of Station KZLN-FM's construction permit accordingly; the substitution of Channel 249A for Channel 266A at East Wenatchee, Washington, and the modification of Station KYSN(FM)'s license accordingly. An engineering analysis has determined that Channel 266A can be allotted at Leavenworth in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's presently authorized site.⁴ Additionally, Channel 248C3 can be allotted to Othello in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.⁵ Channel 249A can be allotted to East Wenatchee in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.⁶ Since Leavenworth, Othello and East Wenatchee are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

5. Accordingly, we will seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No.	
	Present	Proposed
Leavenworth, Washington	249A	266A
Othello, Washington	248C1	248C3
East Wenatchee, Washington	266A	249A

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, P-N-P Broadcasting, Inc., permittee of Station KZLN-FM, Othello, Washington, and Sunbrook Wenatchee, L.P., licensee of Station KYSN(FM), East Wenatchee, Washington, SHALL SHOW CAUSE why Station KZLN-FM's construction permit and Station KYSN(FM)'s license SHOULD NOT BE MODIFIED to specify operation on Channels 248C3 and 249A, respectively, as proposed herein instead of the present Channels 248C1 and 266A, respectively.

7. Pursuant to Section 1.87 of the Commission's Rules, P-N-P Broadcasting, Inc. and Sunbrook Wenatchee, L.P., may, not later than March 24, 1995, file a written statement showing with particularity why their license or construction permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on P-N-P Broadcasting, Inc. and/or Sunbrook Wenatchee, L.P., to furnish additional information. If P-N-P Broadcasting and/or Sunbrook Wenatchee, L.P., raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information fur-

nished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, P-N-P Broadcasting, Inc. and Sunbrook Wenatchee, L.P., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following:

Duane J. Polich, President
P-N-P Broadcasting, Inc.
P.O. Box 2869
Othello, Washington
99344-2869
(Permittee of Station KZLN-FM)

Larry Roberts, President
Sunbrook Wenatchee, L.P.
N. 1212 Washington St.,
Suite 124
Spokane, Washington 99201
(Licensee of Station KYSN(FM))

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before March 24, 1995, and reply comments on or before April 10, 1995, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Melodie A. Virtue
Haley, Bader & Potts
4350 North Fairfax Drive, Suite 900
Arlington, Virginia 22203-2633
(Counsel for Petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such

⁴ The coordinates for Channel 266A at Leavenworth are North Latitude 47-35-32 and West Longitude 120-38-35.

⁵ The coordinates for Channel 248C3 at Othello are North

Latitude 46-45-55 and West Longitude 119-16-49.

⁶ The coordinates for Channel 249A at East Wenatchee are North Latitude 47-22-52 and West Longitude 120-17-16.

decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.